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No. 88-___

In The

Supreme Court of the United States

October Term, 1988

CENTRAL LOUISIANA TELEPHONE COMPANY AND CENTURY TELEPHONE ENTERPRISES, INC.,

Petitioners,

v.

MATTIE McCARROLL,

Respondent.

On Writ Of Certiorari To The Third Circuit Court Of Appeal, State Of Louisiana

PETITION FOR WRIT OF CERTIORARI

L. Scott Patton*
William R. Boles, Jr.
Boles, Boles & Ryan
Attorneys at Law
P. O. Drawer 2065
1805 Tower Drive
Monroe, LA 71207-2065
(318) 388-4050

Attorneys for Petitioners

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. WHETHER THE LOUISIANA THIRD CIRCUIT COURT OF APPEAL ERRED IN CONCLUDING THAT ERISA IMPOSES A FIDUCIARY DUTY UPON EMPLOYERS WHEN THEY AMEND OR ABOLISH A SEVERANCE PAY PLAN PRIOR TO THEIR EMPLOYEES BEING ELIGIBLE FOR SUCH BENEFITS?

2. WHETHER THE LOWER COURTS ERRED IN FAILING TO HOLD THAT PETITIONERS DID NOT ACT ARBITRARILY OR CAPRICIOUSLY IN DENYING McCARROLL FURTHER BENEFITS UNDER THE AMENDED SEVERANCE PAY PLAN?

3. WHETHER THE LOWER COURTS ERRED IN AWARDING McCARROLL PUNITIVE DAMAGES BASED ON LOUISIANA'S WAGE PAYMENT ACT?

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption of this case in this Court. Century Telephone Enterprises, Inc. is the parent company of Central Louisiana Telephone Company. The following list of companies are affiliates of Central Louisiana Telephone Company and wholly owned subsidiaries of Century Telephone Enterprises, Inc., being provided pursuant to Supreme Court Rule 28.1:

Adamsville Telephone Company, Inc.
The Athens Telephone Company, Inc.
Century Telephone Midwest, Inc.
Caddoan Telephone Co.
Central Indiana Telephone Company, Inc.
Century Area Long Lines (Call), Inc. (Wisconsin)
Century Cablenet, Inc.
Century Cellunet, Inc.
Century Cellunet of Battle Creek, Inc.
Century Cellunet of Benton Harbor, Inc.
Century Cellunet of Grand Rapids, Inc.
Century Cellunet of Jackson, Inc.
Century Cellunet of Kalamazoo, Inc.
Century Cellunet La Crosse, Inc.
Century Cellunet of Lansing, Inc.
Century Cellunet of Louisiana, Inc.
Century Cellunet of Michigan, Inc.
Century Cellunet of Monroe, Inc.
Century Cellunet of Muskegon, Inc.
Century Cellunet of Pine Bluff, Inc.
Century Cellunet of Saginaw, Inc.
Century Cellunet of Shreveport, Inc.
Century Cellunet of Texarkana, Inc.
Century Data Systems, Inc.
Century Investments, Inc.
Century Paging, Inc.

PARTIES TO THE PROCEEDING (Cont.)

Century Printing & Publishing, Inc.
Century Service Group, Inc.
Century Supply Group, Inc.
Century Telelink, Inc.
Century Telephone Company, Inc.
Century Telephone of Idaho, Inc.
Century Telephone of Michigan, Inc.
Century Telephone of Wisconsin, Inc.
Century Telesystems, Inc.
Century Teleview of Arkansas, Inc.
Century Teleview of Indiana, Inc.
Century Teleview of Louisiana, Inc.
Century Teleview of Michigan, Inc.
Century Teleview of Missouri, Incorporated
Century Teleview of North Carolina, Inc.
Century Teleview of Tennessee, Inc.
Century Teleview of Texas, Inc.
Century Teleview of Wisconsin, Inc.
Claiborne Telephone Company
Coastal Telephone & Electronics Corporation
Evangeline Telephone Company
Falcon Communications, Inc.
Home Telephone Company
Liberty Telephone Company
Liberty Telephone and Communications, Inc.
Louisiana Western Telephone Co.
Michigan Independent Cellular Telephone Corporation
Mountain Home Telephone Co., Inc.
Mustang Telephone Company
Myrtle Telephone Company, Inc.
Northwest Louisiana Telephone Company, Inc.
Plain Dealing Telephone Company, Inc.
Redfield Telephone Company, Inc.
Saginaw Bay Cellular Company
Union Telephone Company, Inc.
Union Telephone Company of Mississippi, Inc.
United Telephone Company of Louisiana, Inc.
Wyandotte Telephone Company

TABLE OF CONTENTS

Page

Questions Presented i

Parties to the Proceeding ii

Table of Contents iv

Table of Authorities vi

Opinions Below 4

Jurisdiction 4

Statutes Involved 4

Statement of the Case 5

Reasons for Granting the Writ 13

I. Whether the Louisiana Third Circuit Court of Appeal erred in concluding that ERISA imposes a fiduciary duty upon employers when they amend or abolish a severance pay plan prior to their employees being eligible for such benefits? 13

II. Whether the lower courts erred in failing to hold that petitioners did not act arbitrarily or capriciously in denying McCarroll further benefits under the amended severance pay plan? 19

III. Whether the lower courts erred in awarding McCarroll punitive damages based on Louisiana's Wage Payment Act? 25

Conclusion 28

Appendix:

Louisiana Third Circuit Court of Appeal Opinion ..... App. 1

TABLE OF CONTENTS–Continued

Page

Reasons for Judgment of the 28th Judicial District Court, Parish of LaSalle, State of Louisiana ..... App. 12

Judgment of District Court..... App. 20

Order of Louisiana Third Circuit Court of Appeal Denying Motion for Rehearing..... App. 21

Order of Louisiana Supreme Court Denying Writ of Certiorari [reported at 537 So.2d 1162 (La. 1988)]..... App. 22

Trial transcript showing raising of ERISA federal question ..... App. 23

Original Termination Allowance Policy..... App. 27

Amended Termination Allowance Policy..... App. 28

Louisiana's Wage Payment Act, La. Revised Statutes 23:631 and 632..... App. 30

ERISA Statutes

Section 402(b), 29 U.S.C. §1102(b)(3)..... App. 31

Section 404(a), 29 U.S.C. §1104(a) ..... App. 33

Section 409(a), 29 U.S.C. §1109(a) ..... App. 34

Section 502(a), 29 U.S.C. §1132(a) ..... App. 35

Section 502(e), 29 U.S.C. §1132(e) ..... App. 37

Section 514(a), 29 U.S.C. §1144(a) ..... App. 40

TABLE OF AUTHORITIES

Page

CASES:

Anderson v. Ciba-Geigy Corp., 759 F.2d 1518 (11th Cir.), cert. denied, 474 U.S. 995 (1985) 22

Bencivenga v. Western Pa. Teamsters and Employers Pension Fund, 763 F.2d 574 (3d Cir. 1985) 18

Dennard v. Richards Group, Inc., 681 F.2d 306 (5th Cir. 1982) 19, 20

Gilbert v. Burlington Industries, Inc., 765 F.2d 320 (2nd Cir. 1985) 15

Holland v. Burlington Industries, 772 F.2d 1140 (4th Cir. 1985), cert. denied, 477 U.S. 903 (1986) 15, 18, 19, 21

Jung v. FMC Corp., 755 F.2d 708 (9th Cir. 1985) 21

Martinez v. Swift & Co., 656 F.2d 262 (7th Cir. 1981) 21

Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134 (1985) 25, 27

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) 24

Miles v. New York State Teamsters Conference Pension & Retirement Fund Employee Benefit Plan, 698 F.2d 593 (2d Cir.), cert. denied, 464 U.S. 829 (1983) 21

Moore v. Reynolds Metals Co. Ret. Program, 740 F.2d 454 (6th Cir. 1984), cert. denied, 469 U.S. 1109 (1985) 23, 24

TABLE OF AUTHORITIES–Continued

Page

Phillips v. Amoco Oil Co., 799 F.2d 1464 (11th Cir. 1986), cert. denied, ___ U.S. ___, 107 S. Ct. 1893 (1987) 14, 15, 18, 28

Pilot Life Ins. Co. v. Dedeaux, ___ U.S. ___, 107 S.Ct. 1549 (1987) 27

Russell v. Massachusetts Mutual Life Ins. Co., 722 F.2d 482 (9th Cir. 1983) 11, 26

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) ... 2, 17

Sly v. P.R. Maliory & Co., 712 F.2d 1209 (7th Cir. 1983) 22

Smith v. CMTA-IAM Pension Trust, 654 F.2d 650 (9th Cir. 1981) 22

Sutton v. Weirton Steel Div. of Nat. Steel Corp., 724 F.2d 406 (4th Cir. 1983), cert. denied, 467 U.S. 1205 (1984) 14, 15, 16, 17, 18, 19, 28

Tomlin v. Board of Trustees, 586 F.2d 148 (9th Cir. 1978) 22

United Ind. Flight Officers, Inc. v. United Air Lines, Inc., 756 F.2d 1262 (7th Cir. 1985) 16

Vaughan v. Metal Lathers Local 46 Pension Fund, 474 F.Supp. 613 (S.D. N.Y. 1979) 22

Young et al. v. Standard Oil (Indiana) et al., 849 F.2d 1039 (7th Cir. 1988) and 660 F.Supp. 587 (S.D. Ind. 1987), cert. denied ___ U.S. ___, 109 S.Ct. 529 (1988) 14, 16, 17, 19, 21, 28

UNITED STATES CODE:

28 U.S.C. §1257(3) 4

28 U.S.C. §2101(c) 4

TABLE OF AUTHORITIES–Continued

Page

Section 2, 29 U.S.C. §1001, et seq. 1, 4

Section 3(1)(2), 29 U.S.C. §1002(1)-(2) 15

Section 3, (6), 29 U.S.C. §1002(6) 20

Section 101-111, 29 U.S.C. §§1021-1031 15

Sections 201 and 301, 29 U.S.C. §§1051, 1081 15

Section 401-414, 29 U.S.C. §§1101-1114 15

Section 402(b), 29 U.S.C. §1102(b)(3) 13

Section 404(a), 29 U.S.C. §1104(a) 2, 13, 19, 28

Section 409(a), 29 U.S.C. §1109(a) 26

Section 502(a), 29 U.S.C. §1132(a)(1)(B) 5, 11, 27

Section 514, 29 U.S.C. §1144(a) 2

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v.

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On Writ of Certiorari to the Third Circuit Court of Appeal State of Louisiana

PETITION FOR WRIT OF CERTIORARI

This case, which arises under and is governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§1001, et seq., poses a purely legal question: Can an employer unilaterally amend its severance pay plan prior to such time as an employee qualifies to receive severance benefits under the plan without violating ERISA?

Without exception, every federal appellate court that has had an opportunity to address this question recently

has answered it with a resounding "Yes!" The Louisiana Third Circuit Court of Appeal has responded "No". The result is an opinion which stands as anomaly in the jurisprudence of this nation.

This Court has described ERISA as a remedial statute designed to protect the interests of employees in pension and welfare plans and to protect employers from conflicting and inconsistent state and local regulation of such plans. See *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95, 99 (1983). One of Congress' major policy objectives in enacting ERISA was to achieve uniformity in employee benefit laws. This goal of uniformity has been implemented through the enactment of 29 U.S.C. §1144(a) (App. at 40) which is one of the most sweeping federal preemption statutes ever enacted by Congress. In the instant case, the Louisiana Third Circuit Court of Appeal has completely undermined the goal of uniformity sought by Congress in enacting ERISA by failing to properly follow and apply federal law.

Under the aegis of following the federal mandate, the Court of Appeal has declared, without statutory support or citation of authority, that an employer who wishes to amend its severance benefits must comply with the fiduciary obligations of 29 U.S.C. §1104(a). But the law on this point is clear. Under ERISA, an employer does not act in a fiduciary capacity or owe its employees a fiduciary duty when it amends or abolishes a severance pay plan prior to the time that they are eligible for such benefits. The Court of Appeal has also declared, in defiance of the federal law of preemption, that the appropriate remedy for an employer's breach of this, in fact, nonexistent fiduciary duty, includes an award of punitive

damages calculated on the basis of Louisiana's Wage Payment Act, La. R.S. 23:631 and 632. Again, however, the federal courts have spoken definitely on this issue. Under ERISA, an employee does not have a private cause of action for punitive damages based on the improper refusal of the employer to pay employee welfare benefits.

The holding of the Court of Appeal is wrong and is unjust. It is wrong because it fails to follow and apply the applicable law; and, it is unjust because it holds employers in the State of Louisiana to standards and obligations much stricter than those in any other state in this Union. In short, it discourages the implementation by Louisiana employers of any employee severance benefit plans at all.

Although the dollar amounts at stake in this particular suit are not great, the legal issues bear direct, immediate and far reaching consequences for all employers not only in the State of Louisiana, but in all states in the union. Will the goal of uniformity sought by Congress in enacting ERISA be honored and upheld, or will Louisiana be allowed to stand alone among the states of the nation in requiring employers to abide by standards unwarranted and unprecedented in the law? It is for this reason that a writ of certiorari should be accepted by this Court so that it might have the opportunity to review with insight and forethought the egregious errors committed by the Court of Appeal.

OPINIONS BELOW

The decision of the 28th Judicial District Court, Parish of LaSalle, State of Louisiana, is unreported, but is reprinted in the appendix hereto, App. at 12. The opinion of the Louisiana Third Circuit Court of Appeal is reported at 533 So.2d 385 (La. App. 3rd Cir. 1988), and is reprinted in the appendix hereto, App. 1. The Supreme Court for the State of Louisiana denied petitioners' Writ of Certiorari and Review by a four to two vote with one Justice not participating, which denial is reported at 537 So.2d 1162 (La. 1988).

JURISDICTION

The Judgment of the Louisiana Third Circuit Court of Appeal ("Court of Appeal") was entered on October 5, 1988 (App. at 1). The Court of Appeal denied a Motion for Rehearing by its Order dated November 21, 1988 (App. at 21). The Supreme Court of the State of Louisiana denied a Writ of Certiorari application of petitioners by its Order dated February 17, 1989 (App. at 22). This Petition seeks to invoke the jurisdiction of this Court to review the judgment of the Court of Appeal under 28 U.S.C. §1257(3). The timely filing of this Petition meets the 90-day jurisdictional limitation provided by 28 U.S.C. §2101(c).

STATUTES INVOLVED

This cause involves the Employee Retirement Income Security Act of 1974 ("ERISA") 29 U.S.C. §§1001, et seq.

which provides for concurrent jurisdiction to recover employee benefits under its civil enforcement provisions found at 29 U.S.C. §1132(a)(1)(B) and (e) (see App. at 35, 37). Certain sections of ERISA are provided in the Appendix (App. at 31-42).

STATEMENT OF THE CASE

A. Proceedings Below.

This action was commenced on June 4, 1986 by Mattie McCarroll ("McCarroll") in the 28th Judicial District Court for the Parish of LaSalle, State of Louisiana, alleging wrongful denial of severance benefits under a "Termination Allowance" plan maintained by petitioners. Specifically, McCarroll brought a state law claim for additional severance benefits under La. R.S. 23:631 and 632 (App. 30, 31) for which she also sought punitive damages and attorney fees. The case was tried on March 19, 1987 and by Reasons for Judgment (App. 12) the trial court awarded McCarroll $6,158.40 in additional termination allowance benefits, $6,868.80 in punitive damages, and $3,000.00 in attorney fees.

On October 5, 1988 the Court of Appeal rendered its opinion and judgment confirming the trial court's decision (App. 11). The Court of Appeal denied petitioners' Motion for Rehearing on November 21, 1988 (App. 21) and the Supreme Court for the State of Louisiana denied petitioners' Writ of Certiorari on February 17, 1989 (App. 22).

At the trial court petitioners' counsel questioned Century's Vice President of Human Resources, Ray Finney, as to petitioners' legal right under ERISA to amend the "Termination Allowance" policy. The trial court

requested petitioners' counsel to provide the Court with a copy of the pertinent ERISA statutes and it was at this stage in the proceedings that the federal questions to be reviewed under ERISA were raised (App. at 23-26). The trial court in its Reasons for Judgment stated on one hand that ERISA preempted Louisiana's Wage Payment Act (App. at 16), but on the other hand, stated that ERISA gave it wide discretion in awarding damages (App. at 18) and applied La. R.S. 23:632 to grant punitive damages. The Court of Appeal in its October 5, 1988 opinion acknowledged that ERISA applied to the issues raised in this case (App. at 6).

B. Statement of Facts.

This litigation arises out of a dispute concerning McCarroll's alleged entitlement to additional severance pay benefits from her former employers, Central and Century. The facts of the case are essentially undisputed.

McCarroll was hired by Central on August 3, 1971. At that time Central was a wholly owned subsidiary of Continental Telephone Corporation ("Continental").

On June 5, 1978 Continental sold all the stock of Central to Century. Shortly after the Century acquisition, Century's President, Clarke Williams, convened a meeting in which he welcomed the Central employees, including McCarroll, to Century. At that meeting, Mr. Williams assured the Central employees that they would lose no benefits or credit for prior service as a result of the Century acquisition. However, no specific mention was made at that meeting of severance benefits.

At the time of the Century acquisition, Central had no severance pay policy. Century did, however, have a

"Termination Allowance" plan which provided, in part, as follows:

> As a regular full-time or part-time employee, you are eligible to receive termination allowance if your service with CTE is terminated because of a reduction in work force (layoff), an elimination of your job or your dismissal if you are not properly qualified for the job and a more suitable job is unavailable.
>
> The amount, in addition to your unused vacation, will be based upon your credited service and your basic rate of pay (including any permanent differential, but excluding overtime and premium pay) as follows:
>
> > One week's pay for each completed year of service up to and including five years; plus
> >
> > Two week's pay for each completed year of service up to and including five years; plus
> >
> > Three week's pay for each completed year of service from 11 years through 13 years; plus
> >
> > Four week's pay for each completed year of service beyond 13 years; maximum termination allowance cannot exceed 52 weeks.

App. at 27

McCarroll thus became eligible to receive severance benefits in the event of a layoff only as a result of her employment with Century. She continued in that employment until June 28, 1985.

Some six years following the Century acquisition and in response to the court ordered breakup of the AT&T system and the deregulation of the telephone industry, Century began to reevaluate its company policies and practices in an effort to bring them in line with those of its new competitors in the telephone market. One product

of that reevaluation was the decision by Century to amend its severance pay plan to avoid the windfall situation that the Central employees enjoyed. The February 1, 1984 amendment to the "Termination Allowance" provision of its employee handbook provided as follows:

> As a regular full-time or part-time employee, you are eligible to receive termination allowance if your service with CTE is terminated because of a reduction in work force (layoff), an elimination of your job or your dismissal if you are not properly qualified for the job and a more suitable job is unavailable.
>
> The amount in addition to your unused vacation, will be based upon your credited service *(from date of hire or date your company was acquired by Century Telephone, if later)*, and your basic rate of pay "including any permanent differential, but excluding overtime and premium pay" as follows:
>
> > One week's pay for each completed year of service up to and including five years; plus,
> >
> > Two week's pay for each completed year of service from six years through 10 years; plus
> >
> > Three week's pay for each completed year of service from 11 years through 13 years; plus,
> >
> > Four week's pay for each completed year of service beyond 13 years; maximum termination allowance cannot exceed 52 weeks.
>
> App. at 28 (Emphasis added to show language added by February 1, 1984 amendment)

The amendment to the policy prevented Central employees who were hired prior to the June 5, 1978 acquisition from being eligible for severance benefits from the date they were originally hired by Central. Rather, if a Central employee was eligible for severance benefits, then those benefits would be based upon the

latter of the date of their hire or the date Central was acquired by Century.

The amendment was effective pursuant to a provision in the "Introduction" of Century's employee handbook which explained that:

> Policies set forth in its manual are considered to be those of Century Telephone Enterprises, Inc. and they may be interpreted, applied, amended or revoked at any time by the company.

Century's employees, including McCarroll, received timely notice of the February amendment of their severance pay benefits in April or May 1984.

More than one year following the amendment, during the first week of May 1985, Century's management decided to consolidate its customer service center in Jena, Louisiana (where McCarroll worked) with its office in Alexandria, Louisiana, some 45 miles away. On May 13, 1985 Century's Vice President of Human Resources, Ray Finney, met with the Jena employees to notify them of the impending consolidation. At that meeting, the Jena employees were offered the option of either relocating to Alexandria where they were assured comparable jobs at the same salaries, or resigning. Although the Jena employees were not required to move in order to work in the Alexandria office, they were offered $3,000.00 to help defray moving expenses should they desire to relocate.

McCarroll elected to terminate her employment with Century. Her last day at work was June 28, 1985, the last day the customer service office was open. By an interoffice memorandum dated May 24, 1985, McCarroll requested severance pay based on her original hire date

by Central, August 3, 1971. In accordance with its amended severance pay plan (the February 1, 1984 plan in effect at the time of McCarroll's resignation), Century paid McCarroll severance benefits based upon her years of credit service after June 5, 1978 – the date Century acquired Central (rather than the date she was originally hired by Century). McCarroll received severance pay in the amount of $3,434.40 plus an additional $3,000.00 as a bonus for remaining on the job until the Jena office officially closed. In addition, McCarroll received the non-vested portion of her pension retirement account from Century.

Not satisfied with these amounts, McCarroll filed suit against Central and Century on June 4, 1986.[1] The trial court held that the February 1, 1984 amendment was an arbitrary date with no rational justification with the change being implemented only to save Century and Central consolidation expenses. The trial court further stated that it had wide discretion in evaluating the damages under 29 U.S.C. §1132 and that pursuant to *Russell v. Massachusetts Mutual Life Insurance Company*, 772 F.2d 482 (9th Cir. 1983), that it could award punitive damages. The trial court found that Continental had a termination pay

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[1] A similarly situated employee, Judy Jordan, also filed suit on August 8, 1985 seeking similar damages. On September 30, 1988 petitioners' Application for Writ of Certiorari to the Supreme Court of the State of Louisiana arguing the same issues was denied for which petitioners paid Jordan's Judgment totaling $42,827.24 which included $7,927.20 of punitive damages.

plan and quoted provisions of the plan from Century's employee handbook which in fact was the Century "Termination Allowance" policy.

The Court of Appeal correctly found that there was no Continental termination pay plan and that the Central employees, prior to the acquisition by Century, did not enjoy any severance benefits. It stated that the trial court erroneously referred to the Century "Termination Allowance" policy when it concluded that Continental or Central had extended severance benefits to its employees. In addition, it found that the trial court also erred in holding that McCarroll, subsequent to the Century acquisition and the February 1, 1984 amendment, lost benefits she had been provided as an employee of Central. It also found that the statements made by the Century officers at the June 1978 meeting with the Central employees announcing the acquisition stating that no benefits would be lost, did not mislead McCarroll since she had no severance benefits to lose.

The Court of Appeal concluded that although the trial court's factual determinations were erroneous, that its ultimate resolution of the case was the same. The Court of Appeal held that ERISA, and not Louisiana's Wage Payment Act, was the governing law of this case. The Court of Appeal's opinion stated that ERISA imposes a fiduciary obligation upon employers in altering or amending severance pay benefits. It further found that that fiduciary duty had been violated as the motivation for the amendment was to save consolidation costs. The Court of Appeal confirmed the award of punitive damages saying it could rely on La. R.S. 23:632 as a guide in calculating those damages. Both of the lower courts failed

to interpret the last paragraph of the "Termination Allowance" policy (see App. 27 and 28 and footnote 3 infra) which petitioners requested to be reviewed regarding their intrepretation of the eligibility requirements showing that technically McCarroll and the Central employees did not actually qualify for such benefits. Despite this interpretation by petitioners, they paid McCarroll and the other similarly situated Central employees termination pay pursuant to the February 1, 1984 amendment.

Because the issues presented in this case are purely questions of law and because a resolution of these questions bears direct, immediate and far-reaching consequences for all employers, not only in the State of Louisiana, but in all states of this nation due to the violation of the preemption mandate, petitioners respectfully bring this Petition for Writ of Certiorari before this Court to correct the erroneous legal analysis perpetrated by the Court of Appeal.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEAL ERRED IN CONCLUDING THAT ERISA IMPOSES A FIDUCIARY DUTY UPON EMPLOYERS WHEN THEY AMEND OR ABOLISH A SEVERANCE PAY PLAN PRIOR TO THEIR EMPLOYEES BEING ELIGIBLE FOR SUCH BENEFITS.

The Court of Appeal's opinion in the instant case is premised upon its holding that in amending their severance pay plan, petitioners were held to the fiduciary standards outlined in 29 U.S.C. §1104(a). (App. at 33). This initial holding, upon which the entire opinion rests, is the source of the Court of Appeal's error. In its attempt to understand and apply ERISA, the Court of Appeal has managed to create and to hold petitioners to a legal standard which has no justification in the law or the jurisprudence. The result is an opinion fatally flawed in both its analysis and its result.

At the outset of its analysis, the Court of Appeal correctly notes that under ERISA, "Century was, therefore, not per se prohibited from amending its termination allowance policy." (App. at 6). *See also,* 29 U.S.C. § 1102(b)(3), App. at 32. It then reasons, without citation of authority, that although there is no direct prohibition in ERISA against an employer's amending its severance pay plan, the employer, nevertheless, in effecting such an amendment, may not fashion any change it desires, but must meet the fiduciary standards set forth in 29 U.S.C. § 1104(a). As the Court sees it, then, the central issue in this case is whether Century's action was in conformity with fiduciary standards set forth in 29 U.S.C.S. § 1104(a)

(App. at 7). On this very basic and fundamental point, the Court of Appeal could not be more wrong.

As pointed out by the United States Court of Appeals for the Fourth Circuit in the case of *Sutton v. Weirton Steel Div. of Nat. Steel Corp.*, 724 F.2d 406 (4th Cir. 1983), *cert. denied* 467 U.S. 1205 (1984) and more recently by the Seventh Circuit Court of Appeals in the case of *Young v. Standard Oil (Indiana)*, 849 F.2d 1039 (7th Cir. 1988), cert. denied ___ U.S. ___, 109 S.Ct. 529 (1988), under ERISA, an employer does not act in a fiduciary capacity or owe its employees a fiduciary duty when it amends or abolishes a severance pay plan. To the contrary, an employer is free to alter or eliminate severance benefits without consideration of the employees' interests. *See also Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986), *cert. denied* 107 S.Ct. 1893 (1987). Therefore, to the extent that the Court of Appeal's opinion in this case seeks to impose fiduciary obligations upon petitioners with respect to the amendment of their severance pay plan, it is wrong. A close reading of the *Young* case points out just how wrong.

In *Young*, the plaintiffs, former employees of Amoco's Fertilizer and Pesticide Division, filed suit under ERISA alleging that Amoco had breached a fiduciary duty when it unilaterally amended its severance pay plan just prior to the divestiture of the Fertilizer and Pesticide Division. In concluding that defendant Amoco was properly awarded summary judgment on the breach of fiduciary duty claim, the Court of Appeals refused to apply the strict fiduciary requirements imposed on retirement benefit plans to severance pay plans. As the Court explained:

Under ERISA, employee benefits are divided into two categories – "welfare" benefits and "retirement or pension" benefits. 29 U.S.C. § 1002(1)-(2). Although ERISA imposes stringent accrual, vesting, and funding requirements on retirement benefit plans, such requirements are not imposed on welfare benefit plans. 29 U.S.C. §§ 1051, 1081. Severance benefit plans are welfare benefit plans. *Holland v. Burlington Industries, Inc.*, 772 F.2d 1140, 1145 (4th Cir. 1985) *aff'd* 477 U.S. 901, 106 S.Ct. 3267, 91 L.Ed.2d 559, *cert. denied*, 477 U.S. 903, 106 S.Ct. 3271, 91 L.Ed.2d 562 (1986). *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985), *aff'd*, 477 U.S. 901, 106 S.Ct. 3267, 91 L.Ed.2d 558 (1986). As such, severance benefits are unaccrued, unvested benefits. Moreover, severance benefit plans, though subject to certain disclosure (29 U.S.C. §§ 1021-1031) and fiduciary (29 U.S.C. §§ 1101-1114) requirements, are exempt from the more stringent ERISA requirements. 29 U.S.C. §§ 1051, 1081. **An employer may therefore, unilaterally amend or eliminate a severance plan without violating ERISA.** *Sutton v. Weirton Steel Div. of Nat. Steel Corp.*, 724 F.2d 406, 410 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205, 104 S.Ct. 2387, 81 L.Ed.2d 345 (1984). **This is so because an employer is permitted to act in a dual capacity as both the manager of its business and a fiduciary with respect to unaccrued benefits. An employer is therefore, free to alter or eliminate severance benefits (which are usually solely funded by the employer) without consideration of the employees' interests.** *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 1893, 95 L.Ed.2d 500 (1987). **In short, an employer does not owe its employees a fiduciary duty when it amends or abolishes a severance benefit plan.**

> . . . ERISA does not impress a trust upon [an employer's] corporate treasury for the payment of the contingent benefits . . . . It is the unfunded

> nature of the . . . contingent liability that distinguished [these benefits from vested benefits under ERISA].

Sutton, 724 F.2d at 412.

> [T]he mere fact that a company has named itself as a pension plan adminstrator or trustee does not restrict it from pursuing reasonable business behavior in negotiations concerning pension benefits not otherwise affected by the requirements of ERISA.

United Ind. Flight Officers v. United Airlines, 756 F.2d 1256, 1268 (7th Cir. 1985), *quoting Sutton v. Weirton Steel Div. of Nat. Steel Corp.*, 567 F.Supp. 1184, 1201. Thus, just because Amoco administered its employees' severance plan, does not mean Amoco owed a fiduciary duty of care to its employees with respect to the amendment or abolishment of that plan. Though perhaps desirable in normal business conduct, Amoco owed no legal duty to reveal that it intended to create a special severance plan for the divestiture of the F & P division.

Young v. Standard Oil (Indiana), supra, at 1045 (emphasis added).

Under the rationale of the *Young* case, Century, like Amoco, owed no fiduciary duty to its employees with respect to the amendment of its severance pay plan. Rather, Century was free to unilaterally amend that plan without violating ERISA. This is so because, as one court has held: "[t]he accrued benefits secured by ERISA do not encompass unfunded, contingent early retirement benefits or severance payments. The Act was not designed to prohibit modification of these ancillary benefits." *See Sutton v. Weirton Steel Div. of National Steel Corp., supra*, at 410. Thus, in *Sutton*, in rejecting claims that the defendant/employer had breached a fiduciary duty by amending its benefit plan to reduce severance and early

retirement benefits for employees who continued to work for the purchaser in a sale-of-business context, the court held:

> Congress . . . has not prohibited an employer who is also a fiduciary from exercising the right accorded other employers to renegotiate or amend, as the case may be, unfunded contingent benefits payable before normal retirement age. The changes accomplished in this manner, are not to be reviewed by fiduciary standards.

Sutton v. Weirton Steel Div. of National Steel Corp., supra at 410-411 (emphasis added).

In the instant case, the Court of Appeal committed plain error when it refused to heed the clear admonition of the federal courts and instead held petitioners to a fiduciary standard unprecedented and unwarranted in the law.[2]

The court then compounded this initial error by launching into an examination of whether the petitioners' decision to amend their severance pay plan was "arbitrary, capricious or made in bad faith." (*See* App. at 8). However, as the *Young* case instructs, the motivation of an employer for amending a severance pay plan is irrelevant to the question of whether such an amendment violates ERISA because "an employer is . . . free to alter or eliminate severance benefits . . . without consideration of the employees' interests." *Young v. Standard Oil (Indiana), supra,* at 1045. Thus, in *Young,* the Court of Appeal

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[2] The law is well-settled that in construing a federal statute (ERISA), the courts of Louisiana must be guided by the latest expression of the federal appellate courts in determining its meaning. *See Shaw,* supra.

upheld the right of Amoco to unilaterally amend its severance pay plan, despite the fact that the sole reason for the amendment was to save the company approximately $6.2 million in severance pay benefits. Likewise, in *Sutton, supra,* the court accepted as proved the allegation that the defendant/employer's sole motivation for amending its benefits plan was to avoid future contingent benefit obligations. Nevertheless, the court held: "An employer may change such benefits without violating ERISA" *Sutton, supra* at 410. Indeed, as the U.S. Court of Appeals for the Eleventh Circuit reiterated in *Phillips v. Amoco Oil, supra,* at 1471:

> ERISA simply does not prohibit a company from eliminating previously offered benefits that are neither vested or accrued . . . ERISA does not prohibit an employer from acting in accordance with its interests as employer when not administering the plan or investing its assets.

Under ERISA, severance pay, unlike retirement benefits or wages, falls within the category of "employee welfare benefits." *See Holland v. Burlington Industries, Inc.,* 772 F.2d 1140, 1145 (4th Cir. 1985), *cert. denied* 477 U.S. 903 (1986). An employee's inchoate interest in welfare benefits may be unilaterally amended or abolished by the employer with impunity prior to such time as the employee became eligible for those benefits. *See e.g., Sutton v. Weirton Steel Div. of National Steel Corp., supra; Bencivenga v. Western Pa. Teamsters and Employers Pension Fund,* 763 F.2d 574 (3d Cir. 1985). In the instant case, the Court of Appeal erred in failing to recognize and to honor this very basic and fundamental legal principle.

II. THE COURT OF APPEAL ERRED IN FAILING TO HOLD THAT PETITIONERS DID NOT ACT ARBITRARILY OR CAPRICIOUSLY IN DENYING McCARROLL FURTHER BENEFITS UNDER THE AMENDED SEVERANCE PAY PLAN.

Under the controlling law, the central question in this case is not whether petitioners' actions in amending their severance pay plan "was in conformity with the fiduciary standards set forth in 29 U.S.C.S. § 1104(a)" but whether the petitioners' denial of further severance benefits to McCarroll under that *amended* plan violated ERISA. In other words, the central question in this case is not whether petitioners acted properly in amending their severance pay plan – they had the right to unilaterally amend that plan so long as proper notice was given – but whether petitioners properly determined McCarroll's eligibility for severance benefits under that amended plan. It is this issue, the review of determinations of claim eligibility by plan administrators, that is subject to the "arbitrary, capricious or made in bad faith" standard of review cited by the Court of Appeal. *See Holland v. Burlington Industries, Inc., supra; Dennard v. Richards Group, Inc.*, 681 F.2d 306 (5th Cir. 1982); *Young v. Standard Oil (Indiana), supra.* And it is this issue, whether petitioners acted arbitrarily and capriciously in denying McCarroll additional severance benefits under the *amended* plan, that the Court of Appeal utterly failed to address.

Ignoring the admonition of *Sutton, supra,* and *Young, supra,* that petitioners had the right to unilaterally amend their severance pay plan without violating ERISA, the Court of Appeal attempts to bootstrap the arbitrary and

capricious standard of review of eligibility determinations under ERISA into a standard for reviewing the employers' right to amend a severance pay plan. In doing so, the Court falls into serious error. The arbitrary and capricious standard by which claim eligibility determinations are gauged does not apply to the issue of whether an amendment to a severance pay plan is proper. The Court of Appeal opinion itself implicitly acknowledges as much. In its opinion, the Court sets out the six factors to be considered in applying the arbitrary and capricious standard to eligibility claims under ERISA. It then notes:

> In *Dennard*, as in the majority of the cases which have applied the arbitrary and capricious standard, the issues presented for review have been eligibility of the plans. They have been, in other words, reviews of administrators' interpretation of benefit plan languange. In the instant case, we have been called upon to review an employer/administrator's determination that ERISA permitted it to reduce a 'participant's' severance benefits. 29 U.S.C.S. §§ 1002(6) (1982). We, therefore, only find factor six, 'the factual background of the determination . . . and inferences of lack of good faith' or bad faith, as the case may be, to be beneficial. *Dennard, supra* at 314.

(App. at 8)

Obviously, the Court of Appeal recognized the difficulty inherent in applying the standard of review traditionally reserved for eligibility determinations to a question to which that standard has no direct application. Rather than act on that knowledge, the Court of Appeal plunged full speed ahead into an examination of whether the petitioners were in bad faith in deciding to amend their severance pay plan. Had the Court of Appeal followed the applicable law, its analysis would have been

vastly different. It would have initially determined, as the *Young* court did, that petitioners had the right under ERISA to unilaterally amend their severance pay plan, regardless of whether the sole motivation being that amendment was to reduce the petitioners' severance pay liability. It would then have asked, given the petitioners' right to implement the amended plan, whether the denial of further severance payments to McCarroll under that amended plan was arbitrary and capricious. Because of the Court of Appeal's erroneous focus on the first question, it never reached this second issue.

Under ERISA, courts accord great deference to an employer/plan administrator's interpretation of eligibility requirements under a plan, and will uphold an employer/plan administrator's interpretation of the plan if it has a "rational basis" in the language of the plan. *See Martinez v. Swift & Co.*, 656 F.2d 262 (7th Cir. 1981); *Miles v. New York State Teamsters Conference Pension and Retirement Fund Employee Pension Benefit Plan*, 698 F.2d 593 (2d Cir. 1982) *cert. denied*, 464 U.S. 829 (1983). As explained by the court in *Holland v. Burlington Industries, Inc., supra*, at 1148:

> Where claim eligibility is involved, it is necessary to ensure that primary responsibility rests with adminstrators "whose experience is daily and continual, not with judges whose exposure is episodic and occasional," *Berry*, 761 F.2d at 1006. This objective holds true whenever consistent administration of a pension plan or welfare benefit plan covered by ERISA is at issue. Claim eligibility disputes, absent a finding that they have been resolved in an arbitrary and capricious manner, must remain with those who formulate and administer company plans and policies, whether formally trustees or not. *Accord, Jung v.*

FMC Corp., 755 F.2d at 710-712 (9th Cir. 1985); *Sly v. P.R. Mallory & Co., Inc.*, 712 F.2d 1209, 1211 (7th Cir. 1983).

As a result, in determining whether an employer/plan administrator acted arbitrarily or capriciously in denying benefits under a particular plan, the courts will not substitute their judgment for that of the employer. *See Smith v. CMTA-IAM Pension Trust*, 654 F.2d 650, 655 (9th Cir. 1981). Nor will courts choose between several reasonable interpretations of a plan, *see Tomlin v. Board of Trustees*, 586 F.2d 148, 151 (9th Cir. 1978), or determine whether an employer drafted the best possible eligibility requirements for the plan. *See Vaughan v. Metal Lathers Local 46 Pension Fund*, 474 F.Supp. 613, 617 (S.D.N.Y. 1979). Rather, under this highly deferential standard of review, the court's role is limited to determining whether the employer/plan administrator's interpretation of the plan was made rationally and in good faith, not whether it was right. *See Anderson v. CIBA-Geigy Corporation*, 759 F.2d 1518 (11th Cir. 1985), *cert. denied* 474 U.S. 995 (1985).

In the instant case, the amended severance pay plan of petitioners provided as follows:

> As a regular full-time or part-time employee, you are eligible to receive termination allowance if your service with CTE is terminated because of a reduction in work force (layoff), an elimination of your job or your dismissal if you are not properly qualified for the job and a more suitable job is unavailable.
>
> **The amount,** in addition to your unused vacation, **will be based upon your credited service (from date of hire or date your company was acquired by Century Telephone, if later)** and your basic rate of pay "including any permanent differential, but excluding overtime and premium pay" as follows:

See App. at 28. (emphasis added)

Consistent with the clear and unambiguous terms of this plan, McCarroll was paid severance benefits based upon the date her company, Central, was acquired by Century (this being the later date). In addition, she was paid $3,000.00 as a special bonus for remaining with the company until its Jena offices were closed.

There is nothing arbitrary, capricious, or irrational in petitioners' calculation of McCarroll's severance benefits under the terms of this amended plan. The language of the plan is clear and unambiguous. It was applied consistently and uniformly to all employees in McCarroll's situation. The fact that some Central employees who qualified for the termination allowance prior to the February 1, 1984, amendment of the plan were paid benefits based on their date of hire by Central and not on the date of acquisition of Central by Century is irrelevant. The fact remains that all employees received severance benefits consistent with the terms of the severance plan in effect at the time of their eligibility for those benefits.

Moreover, to the extent that the Court of Appeal's opinion in this case seeks to impugn Century's action in amending its severance pay plan because the amendment affected only those employees who became Century employees by virtue of the acquisition of their companies by Century, it constitutes an impermissible attack on the substantive merits of the severance plan. *See Moore v. Reynolds Metal Co. Retirement Program*, 740 F.2d 454 (6th Cir. 1984) *cert. denied*, 469 U.S. 1109 (1985). In *Moore, supra*, the court was faced with a challenge to a plan

provision requiring a five-month waiting period for disability retirement resulting in a loss of all retirement benefits by a dependent spouse of an employee who became disabled but died before the end of the waiting period. The court held that the spouse could not attack the plan provision as being illegally "arbitrary and capricious":

> [O]nce a plan is established and is governed by the requirements of ERISA, courts may review a decision by trustees to deny benefits . . . . Such review, however, is limited to a determination of whether the trustees' actions in administering or interpreting a plan's provisions are arbitrary and capricious . . . Courts . . . have not been authorized by Congress to impose upon employers the court's subjective beliefs concerning the relative value of benefits which employers have chosen voluntarily to confer upon employees.

Moore v. Reynolds Metal Co. Retirement Program, supra at 457 (citations omitted). *See also Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 732 (1985) wherein this Court emphasized that ERISA simply does "not regulate the substantive content of welfare-benefit plans."

In the instant case, petitioners acted neither arbitrarily nor capriciously in their calculation of McCarroll's severance benefits under the terms of the amended plan. Their actions were proper, uniform and in utmost good faith. They were entitled to judgment in their favor.[3]

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[3] A salient example of the good faith exhibited by petitioners in calculating plaintiff's severance benefits under the amended plan is found in the fact that under a plain reading of both the *amended* plan and of the *original* plan, plaintiff clearly

(Continued on following page)

III. THE COURT OF APPEAL ERRED IN AWARDING McCARROLL PUNITIVE DAMAGES BASED ON LOUISIANA'S WAGE PAYMENT ACT

In rendering judgment for McCarroll the Court of Appeal included in its judgment an award of punitive damages calculated on the basis of Louisiana's Wage Payment Act, La. R.S. 23:632. In doing so, the Court of Appeal has run afoul of this Court's decision in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 105 S.Ct. 3085 (1985). There this Court was asked to decide "whether, under the Employee Retirement Income Security Act of 1974 (ERISA), a fiduciary to an employee

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(Continued from previous page)

did not qualify for any severance benefits at all. As the pertinent provisions of Century's employee handbook specify:

> "Loss of your job because of a reduction in the work force or an elimination of your job will not necessarily entitle you to termination allowance if you refuse to accept a comparable job assignment unless you are required to move in order to continue employment."

App. at 27 and 28

This threshold requirement for severance benefits was not changed by Century's February 1, 1984, amendment of its "Termination Allowance" policy. And, the trial record shows McCarroll acknowledged that she was offered a comparable job in Alexandria at the same salary. She was not required to move in order to take the Alexandria job. Thus, under the terms of both the original and amended termination allowance plan, plaintiff did not qualify for any severance pay at all. Nevertheless, Century voluntarily paid her those benefits. The Court of Appeal committed clear error in failing to recognize that even under the original plan, plaintiff was not entitled to receive severance pay and, therefore, Century did not act in bad faith in denying her further benefits.

benefit plan may be held personally liable to a plan participant or beneficiary for extra-contractual compensatory or punitive damages caused by improper or untimely processing of benefit claims." *Id.* at p. 3087. In reversing the decision of the U.S. Ninth Circuit Court of Appeal in *Russell v. Massachusetts Mutual Life, supra,* the case erroneously relied upon by the Court of Appeal in this case as authority for the award of punitive damages, this Court carefully reviewed the language and legislative history of ERISA and concluded that § 409(a) of ERISA (88 Stat. 886, 29 U.S.C. § 1109(a)) does not provide a private cause of action for extra-contractual damages to a beneficiary of a plan for the improper refusal to pay plan benefits.

According to this Court, the text of 29 U.S.C. § 1109(a) (App. at 34) does not expressly authorize a private right of action for compensatory or punitive relief. Rather, this Court held the text of the Act shows that Congress did not intend to authorize any relief except for the plan itself:

> A fair contextual reading of the statute makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary.

Id. at p. 3090. This Court concluded: ". . . we do not find in § 409 express authority for an award of extra-contractual damages to a beneficiary." *Id.* at p. 3091. Nor could such a private cause of action be implied, since the legislative scheme illustrates that Congress did not intend to authorize remedies that it did not incorporate expressly into the Act.

The lesson of *Massachusetts Mutual Life* is clear. An individual participant in a plan is not entitled to punitive damages for the improper denial of benefits under that plan. The Court of Appeal in the instant case refused to heed this Court's admonition on this point, and awarded the plaintiff punitive damages. It compounded this error by calculating the measure of punitive damages on the basis of La. R.S. 23:632. This action completely and improperly ignores ERISA's clear preemption of state law on the question of the availability and measure of punitive damages.

As this Court emphasized in the recent case of *Pilot Life Ins. Co. v. Dedeaux*, 107 S.Ct. 1549, 1556-57 (1987):

> . . . the detailed provisions of § 502(a) [of ERISA] set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA
>
> . . .
>
> The deliberate care with which ERISA'S civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive.

The Court of Appeal erred in the instant case when it failed to defer to ERISA's clear preemptive force and instead awarded plaintiff damages calculated on the basis of state law.

CONCLUSION

Although this case arises under and is governed by the federal law of ERISA, there is really nothing difficult or complicated about its resolution. The issues are simple and straightforward:

1) Could petitioners amend their severance pay plan without violating ERISA?

"Yes"

2) Did petitioners act arbitrarily or capriciously in denying McCarroll further severance benefits under that amended plan?

"No"

Rather than adhere to this analysis and the applicable law, the Court of Appeal strayed. Focusing on the issue of whether petitioners could amend their severance pay plan, the Court of Appeal declared, in direct contravention of every federal appellate court decision that has addressed the issue, that petitioners in amending their severance pay plan, were held to the fiduciary standards set forth in 29 U.S.C. § 1104(a). But, the law on this point is clear. An employer does not act in a fiduciary capacity or owe a fiduciary duty in creating, amending or even abolishing a severance pay plan prior to its employees being eligible for such benefits. *See e.g. Sutton, supra; Young, supra; Phillips, supra.* Under ERISA, an employer is free to unilaterally alter or eliminate contingent future severance benefits without consideration of the employees' interests.

By focusing on and holding petitioner's to a legal duty unprecedented and unwarranted in the law, the Court of Appeal has failed to comprehend and address the only real question presented in this case: whether

Central/Century acted arbitrarily and capriciously in denying McCarroll further severance benefits under the terms of the amended severance pay plan. Under the facts of this case, there can be but one answer to that question: "No!"

The Court of Appeal has further compounded its erroneous analysis of this case by awarding plaintiff punitive damages for the alleged breach of this, in fact, non-existent fiduciary duty, in direct contravention of this Court's pronouncement on the availability of such awards.

The result is an opinion which stands as an anomaly in the law. It must be reversed if the goal of uniformity sought by Congress in enacting ERISA is to be achieved.

The faulty and erroneous legal analysis of the Court of Appeal in this case must be corrected. This Court should reverse the egregious legal error committed by the Court of Appeal and recognize the propriety of the petitioners' actions in determining McCarroll's eligibility for severance pay under its amended termination benefit plan.

Respectfully submitted,

L. Scott Patton,
William R. Boles, Jr.
Boles, Boles & Ryan
Post Office Drawer 2065
1805 Tower Drive
Monroe, Louisiana 71207-2065
Telephone: (318) 388-4050

Attorneys for Petitioners, Central Louisiana Telephone Company and Century Telephone Enterprises, Inc.

April 14, 1989

APPENDIX

NO. 87-669

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

MATTIE McCARROLL

Plaintiff - Appellee

VERSUS

CENTRAL LOUISIANA TELEPHONE COMPANY and CENTURY TELEPHONE ENTERPRISES, INC.

Defendants - Appellants

(Filed October 5, 1988)

Appeal from the 28th Judicial District Court, Parish of LaSalle, State of Louisiana; Hon. Jimmie C. Peters, District Judge, Presiding.

Before DOMENGEAUX, KNOLL and KING, Judges

KING, JUDGE

The primary issues presented by this appeal are whether defendants are jointly, severally, and solidarily liable to plaintiff for additional termination pay benefits; whether federal or state law governs this dispute; and whether plaintiff is entitled to punitive damages and attorney's fees for failure to timely pay the claimed benefits.

Mattie McCarroll (hereinafter plaintiff) filed suit against her former employer, Central Louisiana Telephone Company (hereinafter Central), and Century Telephone Enterprises, Inc, (hereinafter Century), the telephone holding company which currently owns Central, to recover additional severance pay benefits, punitive damages and attorney's fees. Plaintiff filed suit claiming that she was discharged by defendants after her position was abolished because of a reduction in work force. She claims that she is entitled to 24 weeks of termination pay, less benefits already paid, as provided by defendants' "Termination Allowance" policy which was in effect when Central was acquired by Century. Plaintiff also alleged defendants acted arbitrarily and capriciously in failing to pay her these benefits when due, and for this reason she also claims $6,868.80 in punitive damages and $3,000.00 in attorney's fees.

Defendants answered plaintiff's suit alleging that plaintiff's position in Jena, Louisiana was relocated to an office in Alexandria, Louisiana and was not eliminated. In addition, they alleged plaintiff did not qualify for termination pay because she voluntarily resigned.

After a trial on the merits, the trial court rendered judgment in favor of plaintiff and against defendants holding they were jointly, severally and solidarily liable to plaintiff for additional termination pay, punitive damages and attorney's fees totaling $16,027.80. From this judgment defendants timely perfected this suspensive appeal. We affirm the trial court's judgment.

FACTS

In the instant case, all of the factual allegations and legal issues are virtually identical to those presented in the case of Jordan v. Central Louisiana Tel. Co., 525 So.2d 1079 (La.App. 3 Cir. 1988).

Plaintiff began her employment with Central on August 3, 1971. Central, at that time, was a wholly owned subsidiary of Continental.

On June 5, 1978, Century and Continental entered into an agreement which resulted in Century's acquisition of Central. After the acquisition, Century's President, Mr. Clarke M. Williams, welcomed the Central employees at a staff meeting and assured them that their years of credited service with Central would be fully credited by Century. He told them that the would never lose any benefits attributable to their years of service with Central.

Mr. Ray Finney, Century's Vice President of Human Resources, testified that he drafted a comprehensive employee handbook in 1982 which incorporated various company policies and procedures pertaining to employee benefits. The final draft was distributed to the employees of Century, including plaintiff, in November and December, 1983.

The Century employee handbook, in the section entitled "Company Policies," outlined the company's policy regarding a termination allowance as follows:

> "As a regular full-time or part-time employee, you are eligible to receive termination allowance if your service with CTE is terminated because of a reduction in work force (layoff), an elimination of your job or your dismissal if you are not properly

qualified for the job and a more suitable job is available.

The amount, in addition to your unused vacation, *will be based upon your net credited service and your basic rate of pay* (including any permanent differential, but excluding overtime and premium pay) as follows:

One week's pay for each completed year of service up to and including five years; plus,

Two week's pay for each completed year of service from six years through 10 years; plus,

Three week's pay for each completed year of service from 11 through 13 years; plus

Four week's pay for each completed year of service beyond 13 years; maximum termination allowance cannot exceed 52 weeks." (Emphasis added.)

Testimony elicited during the trial showed that Central/Continental had no established severance pay policy for its employees at the time of the Century acquisition.

In January, 1984, after Century had acquired Central, Century's senior management began to reevaluate their termination allowance policy because of the deregulation of the telephone industry. Relying on language found in the "Introduction" of the employee handbook, which stated management reserves the right to interpret, apply, amend or revoke its policies at anytime, Century amended its "Termination Allowance" provision on February 1, 1984, to provide for calculation of severance pay based on the date of hire *or* the date a subsidiary company was acquired by Century, *if later.*

Plaintiff testified that she received notice of the February, 1984 amendment during the month of May, 1984. She also testified that prior to February 1, 1984, former

Central employees who left Century had received a termination allowance based on their original hire date, rather than the date Central was acquired by Century.

During the first week of May, 1985, Century decided to consolidate its customer service center in Jena, where plaintiff was employed, with its office in Alexandria. On May 13, 1985, Mr. Finney met with the Jena office employees to inform them of the impending consolidation and, at that time, the employees were offered the option of either relocating to Alexandria or accepting termination. Those employees wishing to relocate were offered $3,000.00 to help defray moving expenses.

Plaintiff selected termination and was laid off on June 28, 1985, which is the last day the customer service office in Jena was open. By an interoffice memorandum dated May 24, 1985, plaintiff requested her termination pay in one lump sum based on her original hire date of August 3, 1971. Century decided to base her termination pay upon her years of credited service after June 19, 1978, Century acquired Central, in accordance with its amended "Termination Allowance" policy. Plaintiff received $3,434.40 for a termination allowance and an additional $3,000.00 as special pay for remaining on the job with Central until the close of the office in Jena, Louisiana.

On June 4, 1986, plaintiff filed suit for wages and punitive damages based on Louisiana's Wage Payment Act, LSA-R.S. 23:631, *et seq*, seeking total damages of $29,512.80. Trial on the merits was held on March 19, 1987.

Because most of the relevant evidence in this matter had already been presented in the *Jordan* case, much of defendants' presentation at trial was to prove that Century acted in good faith when it amended its termination policy and that justifiable reasons existed for its action.

Mr. Finney testified on behalf of defendants as to Century's motivation in amending its termination benefits policy. He stated that the following factors were of importance in management's decision to make that amendment: (1) employees of acquired companies like Central were receiving a "windfall benefit" due to the fact that these employees did not have a termination pay benefits policy until acquired by Century; (2) the original purpose of severance pay providing short-term financial relief was not being satisfied; and (3) the additional revenue created by the amendment could be better used for the improvement of other benefits (i.e., medical, vacation, insurance coverage, 401-K retirement plans) for all employees.

In *Jordan,* supra, this court concluded that the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C.S. §§ 1101, et seq., clearly preempts state law in the area of termination pay and that defendants are not per se prohibited from amending their severance pay benefits. In *Jordan, supra,* we then proceeded to examine whether Century's action was in conformity with fiduciary standards set forth in 29 U.S.C.S. § 1104(a) and said.

> "Having determined that ERISA does not prohibit an employer from changing its severance pay benefits, we must now decide by what authority Century changed its plan and whether Century's

changes are permitted by ERISA. ERISA provides that included within every employee benefit plan there be 'a procedure for amending such plan and for identifying the persons who have authority to amend the plan.' 29 U.S.C.S. § 1102(b)(3) (1982). Century's employees' handbook, on its 'INTRODUCTION' page, states that the,

> Policies set forth in this manual are considered to be those of Century Telephone Enterprises, Inc., and they may be interpreted, applied, *amended* or revoked at any time by the Company. Strict compliance is required, with the responsibility for their administraton delegated to each Division Manager or equivalent authorities in the Century System. (emphasis added).

Although ERISA does not set forth the elements of an amending procedure which must be included in a plan, it does not necessarily follow that the employer or plan administrator may fashion any change it desires.

ERISA provides that Century, as the plan administrator, must meet certain fiduciary standards. Those standards, set forth in section 1104(a), provide that:

> 'A fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –
>
> (A) for the exclusive purpose of:
> (i) providing benefits to participants and their beneficiaries; and
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.' 29 U.S.C.S. § 1104(a) (1982).

The jurisprudence indicates that in determining whether a plan administrator has implemented his plan in accordance with the direction of section 1104, the courts should give great deference to the administrator's decisions. The case law also establishes that an administrator's action should not be vacated absent a showing that it was arbitrary, capricious or made in bad faith. *Holland*, supra; *Dennard v. Richards Group, Inc.*, 681 F.2d 306 (5th Cir. 1982). It must, therefore, be determined whether Century's decision to calculate Jordan's severance benefits from the time of its acquisition of Central, rather than the date Jordan was hired by Central, was arbitrary, capricious or made in bad faith.

The United States Fifth Circuit in the *Dennard* decision set forth six factors which it suggested should be considered in applying the arbitrary and capricious standard to ERISA claims and in determining the good faith of a plan administrator. Those factors are:

(1) Uniformity of construction;

(2) Fair reading and reasonableness of that reading;

(3) Unanticipated costs;

(4) Internal consistency of a plan under the interpretation given by the administrators;

(5) Any relevant regulations formulated by the appropriate administrative agencies; and

(6) Factual background of the determination by a plan [administrator] and inferences of lack of good faith, if any.

In *Dennard*, as in the majority of the cases which have applied the arbitrary and capricious standard, the issues presented for review have been eligibility determinations rendered in accordance with the language of the plans. They have been, in other words,

reviews of administrators' interpretation of benefit plan language. In the instant case, we have been called upon to review an employer/administrator's determination that ERISA permitted it to reduce a 'participant's' severance benefits. 29 U.S.C.S. §§ 1002(6) (1982. We, therefore, only find factor six, 'the factual background of the determination . . . and inferences of lack of good faith' or bad faith, as the case may be, to be beneficial. *Dennard,* supra at 314.

Century and Central argue that although the amendment to the plan did, in fact, reduce Jordan's severance benefits, it did not violate ERISA's fiduciary standards. The defendants argue that their action amounted to nothing more than reasonable business behavior not prohibited by ERISA. *See Dhayer v. Weirton Steel Division of National Steel Corp.,* 571 F.Supp. 316 (N.D.W.Va. 1983); *aff'd,* 724 F.2d 406 (4th Cir. 1983), *cert. denied,* 467 U.S. 1205, 104 S.Ct. 2387, 81 L.Ed.2d 345 (1984). They submit that they owed an obligation not only to Jordan, but to all the Century Subsidiary employees to assure them that severance benefits would be available should their need for the benefit arise. They maintain that their reduction of Jordan's termination allowance did not reduce it below an amount that would defeat the purpose of providing income for a period of unemployment while a worker seeks a new position.

Century and Central additionally argue that Jordan's demands only amount to a windfall because prior to Century's acquisition Continental/Central employees, of which Jordan was one, enjoyed no termination allowance benefits. The defendants further urge us to take note of the fact that when Central was acquired Jordan's account with Continental/Central was squared. They, in essence, argue that Jordan received everything that she was due from Central for the time she was employed by the company prior it acquisition. The defendants point out in support of their argument that Jordan was only due

retirement benefits and that Continental paid her for her interest.

The fact remains, however, that Century's action amounted to a great reduction in Jordan's termination allowance benefits and the evidence indicates that the motivating force behind the amendment was the desire to decrease the cost of its consolidation efforts. Century's actions, despite testimony to the contrary, lend support to this belief. Although Century amended its employees' handbook in February of 1984 and did not consolidate the Jena and Alexandria offices until more than a year later, the evidence suggests that the policy of consolidation had been in effect for some time prior to February of 1984.

The plaintiff established that as early as May of 1983 Century was consolidating offices and, even more damaging, the fact that some Central employees whose jobs were eliminated prior to the February, 1984 amendment received benefits based upon their date of hire, rather than the date of acquisition. These facts reveal that Century was consciously attempting to reduce the cost of its consolidation policy by denying benefits promised to its employees. Although attempting to reduce one's operating expenses is reasonable business behavior, in this case, the method used was arbitrary and capricious, and violated ERISA.

When Century acquired Central, Century's officers assured the Central employees in broad general language that they would not lose any benefits. Jordan, despite the fact that she had no severance benefits to lose, did have eleven years accumulated 'credited service' with Central. We have no difficulty in understanding that Jordan relied on Century's statements and its termination allowance policy. Century's statements and its severance benefit plan were among the advantages of becoming a Century company employee and remaining with Central.

> The defendants argue that their only purpose in reducing the amount of severance benefits was to bring the plan back in line with the purpose of severance pay, to provide short term income for a displaced employee. Two facts, however, create doubt in this argument. The initial fact is that Century only reduced the benefits of 'acquired' employees as opposed to 'originally hired' employees. Century's actions only affected employees who became Century company employees subsequent to the acquisition of their employer. The second fact is that it is reasonable to pay an employee who has more credited service time a greater amount in severance benefits because an older employee may have a more difficult time obtaining new employment.
>
> It is for these reasons that we conclude that Century/Central's actions were arbitrary, capricious and undertaken in bad faith . . . " Jordan v. Central Louisiana Tel. Co., 525 So.2d 1079 at pages 1086 thru 1088 (La. App. 3 Cir. 1988).

Relying on *Jordan, supra,* and the cases cited therein, we conclude that plaintiff is entitled to recover termination allowance benefits based on the termination allowance policy in effect in June of 1978 when Century acquired Central. For this reason, we find that the trial judge was not clearly wrong or manifestly in error in finding plaintiff was entitled to additional termination pay, attorney's fees, and punitive damages.

For the foregoing reasons, the trial court judgment is affirmed. All costs of appeal are assessed to defendants-appellants.

AFFIRMED.

MATTIE M. McCARROLL	CIVIL SUIT NO. 22,229
VERSUS	28TH JUDICIAL DISTRICT COURT
CENTRAL LOUISIANA TELEPHONE AND CENTURY TELEPHONE ENTREPRISES, INC.	PARISH OF LASALLE
	STATE OF LOUISIANA

REASONS FOR JUDGMENT
(Filed Apr. 16, 1987)

This matter was tried on March 19, 1987. The PLAINTIFF, MATTIE MCCARROLL, has brought suit against CENTRAL LOUISIANA TELEPHONE COMPANY, INC. (CENTRAL) and CENTURY TELEPHONE ENTERPRISES, INC. (CENTURY) seeking certain termination benefits and damages. The issues are basically the same as those raised in the matter of *JUDY G. JORDAN VS CENTRAL LOUISIANA TELEPHONE, ET AL*, Docket Number 21462 of this District.

PLAINTIFF was employed by CENTRAL on August 3, 1971. At that time CENTRAL was a wholly owned subsidiary of the Continental Telephone System and provided the following termination benefits for its employees:

> Section 2. COMPUTATION
> Termination Allowance will be computed as follows:
> One (1) week's pay for each completed year of net credited service up to and including five (5) years; plus
> Two (2) weeks' pay for each completed year of net credited service from six (6) years to ten (10) years, both inclusive; plus
> Three (3) weeks' pay for each completed year of net credited service from eleven (11) years to thirteen (13) years, both inclusive, plus

Four (4) weeks' pay for each completed year of net credited service beyond thirteen (13) years.

In 1978 CENTRAL was acquired by CENTURY. The termination benefits remained the same until late in 1983, at which time CENTURY published an *Employee Handbook* wherein the termination benefits remained the same except that the maximum allowance could not exceed fifty-two weeks. In February 1984, CENTURY again amended the Benefits plan to severely limit termination benefits to the Central employees. This section reads as follows:

TERMINATION ALLOWANCE

As a regular full-time or part-time employee, you are eligible to receive termination allowance if your service with CTE is terminated because of a reduction in work force (layoff), an elimination of your job or your dismissal if you are not properly qualified for the job and a more suitable job is unavailable.

The amount, in addition to your unused vacation, will be based upon your credited service (from date of hire or date your company was acquired by Century Telephone, if later) and your basic rate of pay (including any permanent differential, but excluding overtime and premium pay) as follows:

One week's pay for each completed year of service up to and including five years; plus,

Two weeks' pay for each completed year of service up to and including five years; plus,

Three week's pay for each completed year of service from 11 years through 13 years; plus

Four week's pay for each completed year of service beyond 13 years; maximum termination allowance cannot exceed 52 weeks.
(Emphasis Added).

PLAINTIFF claims this change is improper and claims that she is entitled to benefits under the original plan together with penalties and attorney fees.

In early 1983, CENTURY began consolidation of some of its smaller offices. The Jena office where PLAINTIFF was employed was involved in this consolidation but the actual action did not occur until 1985. In May of 1985 PLAINTIFF was given the option of relocating to Alexandria, Louisiana, or resigning. She was offered a termination package based upon the date of acquisition of CENTRAL by CENTURY. Additionally, she was offered $3,000.00 additional Benefits provided she would work through the last day the Jena office was held open. PLAINTIFF chose to terminate her employment but requested termination benefits under the original CENTRAL plan – from the original hire date.

Based upon introductory language in the *Employee Handbook* CENTURY construes its termination benefits as "policy" and therefore subject to change at the pleasure of the company. This same argument was considered and rejected by the Court in *JORDAN*. In reviewing this aspect of the case in Jordan, the Court made the following statements:

> PLAINTIFF bases her action on Chapter 6 of Title 23 of the *Louisiana Revised Statute*.
>
> *Louisiana Revised Statute* 23:631 provides that in part:
>
> > A. Upon the discharge or resignation of any laborer or other employee of any kind whatever, it is the duty of the person employing such laborer or other employee to pay the amount then due under the terms of employment, . . . not later than 3 days following the date of discharge or resignation . . .

In the event the employer fails to comply with the requirements of *Louisiana Revised Statute* 23:631, the employer is liable to the employee either for 90 days wages or full wages from the time of employee's demand for payment until payment, which ever is the lesser amount. Additionally, the employee is entitled to reasonable attorney fees as fixed cost. See *Louisiana Revised Statute* 23:632.

One of the basic requirements in resolving the issue before the court is determined (should be to determine) exactly what termination benefits are construed as. PLAINTIFF claims the allowance to be wages. DEFENDANTS argue that if (should be it) constitutes a gratuity which can be withdrawn at any time. In reviewing the Table of Contents of the CENTURY TELEPHONE ENTERPRISES, INC. Employee Handbook, it is found that the pertinent provisions are found under "Company Policies." Looking in the Table of Contents under "Company Policies," one finds that the policy in question is found on page 19 under the title of "Termination Allowance." As support for her interpretation, PLAINTIFF cites *Louisiana Revised Statue* 23:640 which reads as follows:

> "Any and all amounts payable by employers under collective bargaining agreements with any labor organization for vacation, health and welfare, pension, apprenticeship and training, supplemental unemployment benefits, or any other fringe benefits considered as wages by the secretary of labor in determining prevailing wage rates shall be considered and treated as wages due by employers under R.S. 23:631-23:639 and employers shall be obligated to pay the said amounts to the trust funds, trustees, or other obligees to whom such payments shall be due and owing in the same manner and subject to the same penalties for nonpayment and the same provisions as to collection and enforcement by the said obligees as apply to ordinary wages under R.S. 23:631-23:639."

Although this does specifically refer to collective bargaining agreements, one could easily construe that if such benefits were "wages" under collective bargaining agreements, there is no reason to define them as anything else under any other form or plan. DEFENDANT cites the case of *Carpenter Local Union, Number 1846* of the *United Brotherhood of Carpenters and Joiners of America, AFL-CIO v Pratt-Farnsworth, Inc.*, 609 F. Supp. 1302, (E.D. La. 1984) as authority for the fact that Louisiana Law construes pension and similar fringe benefits as an action not for wages, but rather a personal action. The Court does not construe these benefits as being fringe benefits within the general definition of pension benefits, but construes them as being fringe benefits similar to supplemental unemployment benefits which are clearly defined as "wages."

Federal law seems to be clear that the Employee Retirement Income Security Act (ERISA) has preempted state law in areas involving severance pay. See *Holland v Burlington Industries, Inc.*, 772 F2d 1140 (4th Cir. app. 1985). Under the rationale of the *Holland* case, severance pay is categorized as an "employee welfare benefit plan" as defined in 29 *U.S.C.* Sec. 1002(1). In *Holland*, the issue was whether or not the DEFENDANT was arbitrary and capricious in modifying the termination or severance allowance. See also *Fentron Industries, Inc. v The National Shopmen Pensions Fund*, 675 F2d 1300 (9th Cir. app. 1982).

The nature of a welfare benefit plan is that of a form of deferred benefit which is offered by virtue of an employee's affiliation with a certain employer. Applying the *Holland* test one can come to no other conclusion in this matter but that DEFENDANTS were arbitrary and capricious. Although the parent company has differed, JUDY G. JORDAN has continuously been employed by the same legal entity, CENTRAL LOUISIANA TELEPHONE COMPANY. In 1978 she and other employees were guaranteed by the

new owners that there would be no change in "benefits." Whether the termination or severance allowance is within the legal definition of "benefit" is not the question. Clearly to the laymen this was a benefit that induced her to continue working for her employer. An arbitrary date was established. The company established a date which, on the surface, has no rational justification. In fact, the change appears to be designed only to save CENTURY and CENTRAL financial expenditures in its consolidation process. Employees were treated drastically differently based solely upon an arbitrary date. The Court has been presented with no evidence to indicate any justification for a change in the policy other than to save expenses to the detriment of a long term and loyal employees. One can only conclude that such a change in policy which is made retroactive in the manner that this change was made is in itself arbitrary and capricious.

The Court cannot find that the employer made a good faith decision as a plan administrator to reduce the severance pay. There has been no evidence to indicate any past practices to determine whether or not the conduct radically departs from the employer's prior pattern of conduct and there has not even been any presentation of evidence as to unanticipated cost on behalf of the DEFENDANTS. In fact, DEFENDANTS could easily calculate, based upon the hire date of its known employees, its actual anticipated cost and should have done so in making the promise it did at the transfer in 1978.

Thus whether this action proceeds under the Federal ERISA Statute or under state law, the PLAINTIFF is entitled to recover.

29 *U.S.C.* Sec. 1132 provides for civil enforcement in a ERISA action. It reads in part as follows:

A civil action may be brought –

(1) by a participant or beneficiary –

* * *

(B) to recover benefits due to him under the plan,

* * *

Although there seems to be some question as to the amount in type of damages awardable under this Federal Legislation, it does seem clear the trial court is given wide discretion in evaluating the damages. See *Russell v Massachusetts Mutual Life Insurance Company*, 772 F2d 482 (C.A. 1983).
(*Jordan v Central Louisiana Telephone and Century Telephone Enterprises, Inc.*, Reasons For Judgment, pages 5-8).

Much of the DEFENDANT'S presentation in this case was to show a rational justification for the company action. The rationale is that the Company chose to act as a fiduciary for CENTURY's long time employees to the detriment of CENTRAL's long time employees. It is significant to note that the amount of sick leave and vacation time accumulated by employees is based upon date of hire and not date of acquisition by CENTURY.

PLAINTIFF is entitled to recover damages in the amount of $12,592.80. This calculation is based upon a weekly pay period of 40 hours at $9.54 per hour for a period of 24 weeks, less payments made. Additionally, the 90 day penalty is calculated at the rate of $9.54 per hour based on an eight hour day. PLAINTIFF is awarded attorney fees in the amount of $3,000.00.

The DEFENDANTS are jointly, severally and in solido liable for these obligations and taxed with all costs. Upon presentation of the appropriate Judgment, the same will be signed in due course.

THUS DONE AND SIGNED in Jena, LaSalle Parish, Louisiana, this 6th day of April, 1987.

/s/ Jimmie C. Peters
JIMMIE C. PETERS
DISTRICT JUDGE

CIVIL SUIT NUMBER 22,229

MATTIE M. McCARROLL	28TH JUDICIAL DISTRICT COURT
VERSUS	PARISH OF LASALLE
CENTRAL LOUISIANA TELEPHONE COMPANY, ET AL	STATE OF LOUISIANA

FILED _____ CLERK _____

JUDGMENT
(Filed April 22, 1987)

THIS CAUSE having been duly heard on March 19, 1987 and submitted to the Court for adjudication, and the Court considering the law and the evidence to be in favor of plaintiff, Mattie McCarroll, for the reasons orally assigned, orders the defendants, CENTRAL LOUISIANA TELEPHONE COMPANY and CENTURY TELEPHONE ENTERPRISES, INC. to pay the plaintiff Mattie M. McCarroll, the full sum of SIXTEEN THOUSAND TWENTY-SEVEN DOLLARS AND TWENTY CENTS ($16,027.20) with legal interest thereon from date of judicial demand until paid and all costs.

JUDGMENT READ, RENDERED AND SIGNED this 22nd day of April, 1987 at Jena, Louisiana.

/s/ Jimmie C. Peters
JIMMIE C. PETERS,
DISTRICT JUDGE

/am

COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA

MATTIE McCARROLL	)	
	)	
v.	)	No. 87-669
CENTRAL LA. TELEPHONE CO., ET AL.	)	

BEFORE: JUDGES DOMENGEAUX-KNOLL-KING

ORDER

The Application for Rehearing herein having been duly considered:

IT IS ORDERED that a Rehearing be, and the same is hereby, REFUSED.

Lake Charles, Louisiana, this 21st day of November, 1988.

JED
JTK
CSK

Judges

Filed November 21, 1988.
/s/ Nancy U. Pledger
Clerk

THE SUPREME COURT OF
THE STATE OF LOUISIANA

MATTIE McCARROLL

VS. NO. 88-C-3075

CENTRAL LOUISIANA TELEPHONE COMPANY AND CENTURY TELEPHONE ENTERPRISES, INC.

IN RE: Central Louisiana Phone; Century Telephone Enterpises; Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Third Circuit, Number CA87-0669; Parish of LaSalle 28th Judicia1 District Court Number 22,229

February 17, 1989
Denied.

JAD
JCW
HTL
LFC

MARCUS & DENNIS, JJ., would grant the writ.

Supreme Court of Louisiana
February 17, 1989

/s/ Frans J. Labranche, Jr.
Clerk of Court
For the Court

TWENTY-EIGHTH JUDICIAL DISTRICT

PARISH OF LA SALLE

STATE OF LOUISIANA

MATTIE M. McCARROLL

VERSUS SUIT NO. 22,229

CENTRAL LOUISIANA TELEPHONE CO., ET AL

TRIAL

HEARD ON

TUESDAY, MARCH 19, 1987

HONORABLE JIMMIE C. PETERS, JUDGE PRESIDING

APPEARANCES:

Wm. HENRY SANDERS, ESQ.	FOR PLAINTIFF
SCOTT L. PATTON, ESQ. Boles, Boles & Ryan	: FOR DEFENDANTS
WILLIAM R. BOLES, JR., ESQ. Boles, Boles & Ryan	:

(p. 168 Patton questioning Ray B. Finney, Century's Vice President of Human Resources)

Q Why did senior management feel they have a right to change the policy, the termination allowance policy?

A I think several reasons. First of all, in the front page of our handbook there's a section that says: management reserves the right to amend, suspend, revoke, terminate the policies at any time. Number two, the . . .

Q And was that – the first page in the handbook, of course, that was given to the employees? They had proper notice, fair notice . . .

A Right.

Q . . . of that right?

A We specifically intentionally put it in the front of the handbook so that everybody would read it. We certainly didn't want to hide it. The second . . .

Q Okay. Go on to other reasons why you felt you had a right to change it. I'm sorry.

(p. 54) A Okay. Secondly, since a number of our benefit plans and policies are covered under ERISA the company, as the plant [plan], as the plant [plan] administrator and administering these plans, has certain things that it's supposed to do; one of which is to, it does have the right to change policies as long as it communicates the change fairly to the employee and as long as it does it for a compelling financial business reason and doesn't do it in an arbitrary and capricious manner.

Q Under ERISA, is termination pay a vested or a nonvested benefit?

A It's a nonvested benefit.

Q Do you know if the vesting provisions under ERISA apply to termination pay?

A No, sir, they don't.

Q Can you tell us why they do not? Does the – does termination pay fall under the category of pension plans? Or, what kind of a category does it fall under?

A The vested provisions apply to the pension-type plans. Termination allowance is a welfare plan and there are no vesting provisions.

Q So, under ERISA a welfare plan which would include termination pay under its category, the plan administrator is a fiduciary and has a right to amend it if it has, if it does so in good faith . . .

A That is correct.

Q . . . for financially compelling business reasons?

A That's correct.

Q Can you tell us why the defendants were in good faith in making this amendment to the termination pay policy?

A Well, I go back again to the same reasons I gave a minute (p. 55) ago: we feel like we had the right as outlined in the front of the handbook to make the changes.

Q Because of reserving the right to do so?

A Of reserving that right. And also because as the plan administrator of these plans the company has the right to make the changes as long as its not arbitrary and capricious, dealing in good faith and communicates it fairly to the participants.

Q And in this case notice of the amendment was given to the employees when?

A Notice of the amendment was given, I believe, in May 1985.

Q And possibly April?

A Could have been April – it could have been April. It was either April or May '85.

Q And what does ERISA require in giving notice, proper notice to employees? What time frame?

A You have at the end of seven months in the year following the year you make the change.

Q Would another fact to show defendants' good faith in amending the policy be the consistent treatment of all employees under the preamendment to the policy and then after the amendment? They were all paid according to the policy in effect at the time?

A Yes, sir.

Q And, again, since the defendants were in good faith, the compelling financial reason was because of the windfall situation . . .

A The windfall . . .

Q . . . being one?

A . . . situation.

* * *

PLAINTIFF'S EXHIBIT 26

ORIGINAL TERMINATION ALLOWANCE

As a regular full-time or part time employee, you are eligible to receive termination allowance if your service with CTE is terminated because of a reduction in work force (layoff), an elimination of your job or your dismissal if you are not properly qualified for the job and a more suitable job is unavailable.

The amount, in addition to your unused vacation, will be based upon your net credited service and your basic rate of pay (including any permanent differential, but excluding overtime and premium pay) as follows:

One week's pay for each completed year of service up to and including five years; plus,

Two week's pay for each completed year of service from six years through 10 years; plus,

Three week's pay for each completed year of service from 11 years through 13 years; plus

Four week's pay for each completed year of service beyond 13 years; maximum termination allowance cannot exceed 52 weeks.

Termination allowance for part-time employees will be computed according to their normal workweek.

You will receive payments on regular paydays during the period in which you are eligible. These payments are not to be considered an extension of your employment, which ceases on the last day you work for the Company. Upon your request and subject to senior management approval, you may receive one lump sum payment.

If you are re-hired while receiving termination allowance as a continuation of regular pay, payments cease and you will not be expected to repay the Company. In this situation, you would not have suffered a break in service. Termination allowance for subsequent termination will be computed on the basis of your length of service, less any previously received payments.

If you are re-hired after a break in service, termination allowance will be based on your re-hire date. There will be no deduction for any previous termination allowance.

Loss of your job because of a reduction in the work force or an elimination of your job will not necessarily entitle you to termination allowance if you refuse to accept a comparable job assignment, unless you are required to move in order to continue employment.

PLAINTIFF'S EXHIBIT 27

FEBRUARY 1, 1984 AMENDED TERMINATION ALLOWANCE

As a regular full-time or part time employee, you are eligible to receive termination allowance if your service with CTE is terminated because of a reduction in work force (layoff), an elimination of your job or your dismissal if you are not properly qualified for the job and a more suitable job is unavailable.

The amount, in addition to your unused vacation, will be based upon your credited service (from date of

hire or date your company was acquired by Century Telephone, if later) and your basic rate of pay (including any permanent differential, but excluding overtime and premium pay) as follows:

One week's pay for each completed year of service up to and including five years; plus,

Two week's pay for each completed year of service from six years through 10 years; plus,

Three week's pay for each completed year of service from 11 years through 13 years; plus

Four week's pay for each completed year of service beyond 13 years; maximum termination allowance cannot exceed 52 weeks.

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If you are re-hired while receiving termination allowance as a continuation of regular pay, payments cease and you will not be expected to repay the Company. In this situation, you would not have suffered a break in service. Termination allowance for subsequent termination will be computed on the basis of your length of service, less any previously received payments.

If you are re-hired after a break in service, termination allowance will be based on your re-hire date. There

will be no deduction for any previous termination allowance.

Loss of your job because of a reduction in the work force or an elimination of your job will not necessarily entitle you to termination allowance if you refuse to accept a comparable job assignment, unless you are required to move in order to continue employment.

La.R.S. 23:631

§ 631. Discharge or resignation of employees; payment within three days after termination of employment.

A. Upon the discharge or resignation of any laborer or other employee of any kind whatever, it shall be the duty of the person employing such laborer or other employee to pay the amount then due under the terms of employment, whether the employment is by the hour, day, week, or month, not later than three days following the date of discharge or resignation. Said payment shall be made at the place and in the manner which has been customary during the employment, except that payment may be made via United States mail to the laborer or other employee, provided postage has been prepaid and the envelope properly addressed with the employee's or laborer's current address as shown in the employer's records. In the event payment is made by mail the employer shall be deemed to have made such payment when it is mailed.

B. In the event of a dispute as to the amount due under this Section, the employer shall pay the undisputed portion of the amount due as provided for in Subsection A of this Section.

C. With respect to interstate common carriers by rail, a legal holiday shall not be considered in computing the three day period provided for in Subsection A of this Section.

Amended by Acts 1977, No. 317, § 1.

§ 632. Liability of employer for failure to pay; attorney fees

Any employer who fails or refuses to comply with the provisions of R.S. 23:631 shall be liable to the employee either for ninety days wages at employee's daily rate, or else for full wages from the time the employee's demand for payment is made until the employer shall pay or tender the amount of unpaid wages due to such employee, whichever is the lesser amount of penalty wages. Reasonable attorney fees shall be allowed the laborer or employee, in the event a well-founded suit for any unpaid wages whatsoever be filed by the laborer or employee after three days shall have elapsed from time of making the first demand following discharge or resignation.

Amended Acts 1964, No. 422 § 1; Acts 1977, No. 317, § 1.

29 USCS § 1102

§ 1102. Establishment of plan

(a) Named Fiduciaries. (1) Every employee benefit plan shall be established and maintained pursuant to

a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this title, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such employee organization acting jointly.

(b) **Requisite features of plan.** Every employee benefit plan shall–

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this title,

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 405(c)(1)[29 USCS § 1105(c)(1)],

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

(c) **Optional features of plan.** Any employee benefit plan may provide–

(1) that any person or group of persons may serve in more than one fiduciary capacity with respect to the plan (including service both as trustee and administrator);

(2) that a named fiduciary, or a fiduciary designated by a named fiduciary pursuant to a plan procedure described in section 405(c)(1) [29 USCS

§ 1105(c)(1)], may employ one or more persons to render advice with regard to any responsibility such fiduciary has under the plan; or

(3) that a person who is a named fiduciary with respect to control or management of the assets of the plan may appoint an investment manager or managers to manage (including the power to acquire and dispose of) any assets of a plan.

(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 4, § 402, 88 Stat. 875.)

§ 1104. Fiduciary Duties

(a) Prudent man standard of care.(1) Subject to sections 403(c) and (d) [29 USCS § 1103(c) and (d)], 4042 [29 USCS § 1342], and 4044 [29 USCS § 1344], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and–

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or title IV.

(2) In the case of an eligible individual account plan as defined in section 407(d)(3) [29 USCS § 1107(d)(3)]), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 407(d)(4) and (5) [29 USCS § 1107(d)(4) and (5)]).

(b) Indicia of ownership of assets outside jurisdiction of district courts. Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) Control over assets by participant or beneficiary. In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)–

(1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 4, § 404, 88 Stat. 877; Sept. 26, 1980, P. L. 96-364, Title III, § 309, 94 Stat. 1296.)

§ 1109. Liability of breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to

the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act [29 USCS § 1111].

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this title if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 4, § 409, 88 Stat. 886.)

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action. A civil action may be brought–

(1) by a participant or beneficiary–

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 USCS § 1109];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation 105(c) [29 USCS § 1025(c)];

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or

(6) by the Secretary to collect any civil penalty under subsection (i).

(b) **Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions.** (1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of the Internal Revenue Code of 1954 [26 USCS §§ 401(a), 403(a), or 405(a)] (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) with respct [respect] to a violation of, or the enforcement of, parts 2 and 3 of this subtitle [29 USCS §§ 1051 et seq., §§ 1081 et seq.] (relating to participation, vesting, and funding), only if

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 515 [29 USCS § 1145].

(c) **Administrator's refusal to supply requested information.** Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(d) **Status of employee benefit plan as entity.** (1) An employee benefit plan may sue or be sued under this title as an entity. Service of summons, subpoena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this title against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this title.

(e) **Jurisdiction.** (1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts

of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) **Amount in controversy; citizenship of parties.** The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection(a) of this section in any action.

(g) **Attorney's fees and costs; awards in actions involving delinquent contributions.** (1) In any action under this title (other than an action described in paragraph 2) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this title by a fiduciary for or on behalf of a plan to enforce section 515 [29 USCS § 1145] in which a judgment in favor of the plan is awarded, the court shall award the plan–

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of–

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For the purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of the Internal Revenue Code of 1954 [26 USCS § 6621].

(h) Service upon Secretary of Labor and Secretary of the Treasury. A copy of the complaint in any action under this title by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle [29 USCS §§ 1101 et seq.]. If the Secretary brings an action under subsection (a) on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty. In the case of a transaction prohibited by section 406 [29 USCS § 1106] by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved (as defined in section 4975(f)(4) of the Internal Revenue Code of 1954 [26 USCS § 4975(f)(4)]); except that if the transaction is not corrected (in such manner as the Secretary shall prescribe by regulation, which regulations shall be consistent with section 4975(f)(5) of such Code [26 USCS § 4975(f)(5)]) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan

described in section 4975(e)(1) of such Code [26 USCS § 4975(e)(1)].

(j) Direction and control of litigation by Attorney General. In all civil actions under this title, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of title 28, United States Code [28 USCS § 518(a)], but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of action against Secretary of Labor. Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this Act, or to compel him to take action required under this title, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(Sept. 2, 1974, P.O. 93-406, Title I, Subtitle B, Part 5, § 502, 88 Stat. 891; Sept. 26, 1980, P. L. 96-364, Title III, § 306(b), 94 Stat. 1295.)

§ 1144. Other laws

(a) Supersedure; effective date. Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 USCS § 1003(a)] and not exempt under section 4(b) [29 USCS § 1003(b)]. This section shall take effect on January 1, 1975.

(b) Construction and application. (1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred; before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this title shall be construed to exempt or

relieve any person from nay law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 4(a) [29 USCS § 1003(a)], which is not exempt under section 4(b) [29 USCS § 1003(b)] (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 506 of this Act [29 USCS § 1136].

(4) Subsection (a) shall not apply to any generally applicable criminal law of a State.

(c) **Definitions.** For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of the United States prohibited. Nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede

any law of the United States (except as provided in sections 111 [29 USCS § 1031] and 507(b) [29 USCS § 1137(b)]) or any rule or regulation issued under any such law.

(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 5, § 514, 88 Stat. 897.)

The timeliness of the mailing may be shown by an official United States postmark or other official documentation from the United States Postal Service.